NORFOLK ENERGY INC.

IBLA 88-356 Decided July 25, 1990

Appeal from a decision of the Montana State Director, Bureau of Land Management, upholding the determination of the Great Falls Resource Area Manager requiring submission of a plan for measuring farm tap gas and an accounting for lost Federal and tribal royalties. SDR-922-88-01.

Affirmed.

1. Oil and Gas Leases: Production--Oil and Gas Leases: Unit and Cooperative Agreements

   Departmental regulations at 43 CFR Part 3160 governing onshore oil and gas operations apply to gas produced from private leases which participate with Federal and/ or Indian leases under a unit agreement approved by the Department's authorized officer. Accordingly, a unit operator is required to measure all gas produced and submit monthly production reports for production from such leases under 43 CFR 3162.7-3 and 3162.4-3(d), respectively, to aid BLM in accounting for royalties due for the Federal and/or Indian leases.

2. Oil and Gas Leases: Royalties: Generally

   Farm tap gas, which is gas provided free to a roy-alty owner for structures on the land covered by such owner's oil and gas lease, is subject to royalty under 30 CFR 202.102 (1987).

3. Estoppel--Federal Employees and Officers: Authority to Bind Government

   Application of the doctrine of equitable estoppel requires a demonstration of affirmative misrepresentation or affirmative concealment of a material fact by the Government. A statement by a BLM employee that it was his personal opinion that farm tap gas was royalty free, with the express caveat that further advice would be sought from superiors and from counsel before the issue was resolved, cannot be the basis for a claim of estoppel.

APPEARANCES: Mary Scrim, Esq., Billings, Montana, for Norfolk Energy, Inc.; Roger W. Thomas, Esq., Office of the Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Norfolk Energy Inc. (Norfolk) has appealed a March 4, 1988, deci-sion of the Montana State Director, Bureau of Land Management (BLM), which affirmed a December 21, 1987, decision of the Great Falls Resource Area Manager requiring Norfolk (formerly known as "Tricentrol United States, Inc.") to submit within 30 days a plan for measuring farm tap gas, and an accounting of past gas production and lost Federal and tribal royalties.

The Area Manager issued his decision on December 21, 1987, following a BLM investigation of unmetered farm tap gas in the Bullhook Gas Unit Area in Hill County, Montana. 1/ He found that Norfolk's failure to measure and report the farm tap gas was a violation of 43 CFR 3162.7-3 and 3162.4-3(d), requiring proper measurement and reporting of gas, respectively. He ordered an accounting of lost Federal and tribal royalties.

On January 21, 1988, Norfolk requested State Director review of the Area Manager's decision, in accordance with 43 CFR 3165.3(b). On February 24, 1988, the State Director allowed Norfolk to make an oral presentation. 2/ In his March 4, 1988, decision, the State Director found that all gas produced from Federal leases, or specifically, pro-duced from the fee mineral estate committed to Federal unit agreements, is, in accordance with 30 CFR 221.44 (1972) and 30 CFR 202.102 (1987), subject to royalty. 3/ He noted further that neither the unit agreement nor the Federal leases contained provisions concerning royalty-free gas, and that absent a clear and specific exemption, royalties were due the United States.

1/ Farm tap gas is gas provided free of charge in accordance with that part of Section 12 of the Bullhook Unit Agreement which provides:

"Subject to the prior and overriding right of the Unit Operator to plug and abandon any such well, each royalty owner having structures on the lands covered by such owner's oil and gas lease shall have gas free of charge from any Unit well to the extent and for the purposes provided for in each individual lease. The use of said gas to be at the royalty owner's sole risk and expense." Under such an arrangement, certain royalty owners could receive free gas for use on their "farms or ranches."

2/ Although the record indicates that the oral presentation was recorded on a cassette tape, that tape is not part of the record before the Board and, therefore, has not been considered in our deliberations on this appeal.

3/ The 1987 regulation provided: "Gas of all kinds (except gas used for purposes of production on the leasehold or unavoidably lost) is subject to royalty." The 1972 version included that language, as well as language requiring the measurement of all gas.

The State Director, having found that the farm tap gas is subject to royalties, determined that such gas was required to be measured under 43 CFR 3162.7-3 or 30 CFR 221.44 (1972). Citing Tricentrol United States, Inc., 97 IBLA 387 (1987) (Tricentrol), he noted that the regulations at 43 CFR Part 3160 apply to private leases which participate with Federal and/or Indian leases under a unit agreement approved by the Department's authorized officer. In Tricentrol, which also involved the Bullhook Unit, the Board held that, under 43 CFR 3162.7-4(d)(1), a unit operator was required to submit diagrams of site facilities, even where such facilities are located on private leases, in order to aid BLM in accounting for production and royalties allocated to the Federal and/or Indian leases.

The State Director disagreed with Norfolk's contention that since farm tap gas was not sold, it could not be considered a unitized substance under the Bullhook Unit agreement. He cited Section 17 of the unit agreement as requiring the unit operator to make a proper and timely gauge of all gas withdrawals. He concluded that since fee and Federal lands participate in all production, all unit production must be accounted for and royalties paid, regardless of whether the gas is sold.

Finally, he rejected Norfolk's contention that BLM personnel had made a "verbal commitment" to the effect that no royalties were required for farm tap gas.

With its statement of reasons (SOR), Norfolk filed a motion to stay action on its appeal pending resolution of its suit for judicial review of our Tricentrol decision. On June 28, 1988, we granted a stay. Thereafter, on September 26, 1988, the United States District Court for the District of Montana issued a memorandum and order in Norfolk Energy, Inc. v. Hodel, No. 87-188-GF-PGH, affirming the Tricentrol decision. On October 27, 1988, Norfolk requested a continuation of the stay until the United States Court of Appeals for the Ninth Circuit could rule on an appeal of the District Court's order. We granted Norfolk's request by order dated November 18, 1988. On April 30, 1990, Norfolk notified the Board that on March 28, 1990, the Ninth Circuit in Norfolk Energy, Inc. v. Hodel, 898 F.2d 1435 (1990), affirmed the District Court's order. It asserted that, notwithstanding that outcome, the State Director's decision should be reversed for the reasons provided in its SOR.

[1] To the extent that Norfolk claims that Federal regulations are inapplicable to private leases in the Bullhook Unit, that argument must be rejected based on our rationale set forth in Tricentrol, 97 IBLA at 391- 95, and approved by the Circuit Court. In addition, on February 20, 1987, the Department promulgated final regulations which clearly state at 43 CFR 3161.1(b) that State or privately owned mineral lands committed to a Federally approved unit agreement are subject to the Federal regulations governing onshore oil and gas operations in 43 CFR Part 3160. 4/

4/ 43 CFR 3161.1(b) provides:

"(b) Regulations in this part relating to site security, measure-ment, reporting of production and operations, and assessments or penalties for noncompliance with such requirements are applicable to all wells and

We, therefore, conclude that BLM properly exercised its authority in requiring Norfolk to measure gas production and to file reports of production under 43 CFR 3162.7-3 and 3162.4-3(d), respectively.

Norfolk also argues that the State Director erred in referring to the Bullhook Unit as an approved Federal unit agreement. Norfolk points out that the form utilized in the agreement was not a Federal unit agree-ment form. What Norfolk ignores, however, is the fact that, as noted in Tricentrol, 97 IBLA at 393, on December 19, 1972, the Area Director, Bureau of Indian Affairs, formally approved the Bullhook Unit Agreement, as "necessary and advisable in the public interest and * * * for the purpose of more properly conserving the natural resources." Further, the present record shows that the Area Oil and Gas Supervisor, Geological Survey, provided the same approval on December 27, 1972. Therefore, regardless of the type of form utilized for the agreement, it received the scrutiny and approval of Federal officals. We find no error.

Next, Norfolk argues, as it did before the State Director, that under Section 12 of the Bullhook Unit Agreement, "everyone's share production, including the United States Government's share, is determined net of the free gas given royalty owners * * *" (SOR at 4). 5/ As pointed out by the State Director in his decision, Section 12 of the unit agreement does not specify that such gas would be royalty free; rather, it states that certain royalty owners will receive gas free of charge to the extent provided for in each individual lease. The Federal leases involved in the unit, the State Director stated, contain no provisions concerning free gas. Norfolk points to no error in the State Director's reasoning, and we find none. The language cited by Norfolk does not support its conclusion.

We turn now to consideration whether Norfolk is obligated to pay royalty on the free farm tap gas. Norfolk refers to the following provisions of section 12 of the unit agreement as supportive of its argument that farm tap gas is not a unitized substance and, therefore, not subject to royalty calculations:

> On the effective date of this Agreement, and thereafter, all Unitized Substances produced hereunder (except any part thereof used in conformity with good operating practices for drilling, operating, camp and other production or development purposes, in accordance with the unit Operator's plan of operation, or unavoidably lost) shall be deemed to be produced from the several Tracts of Unitized Land, and for the purpose of determining any benefits accruing under this Agreement each

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fn. 4 (continued)
facilities on State or privately-owned mineral lands committed to a unit
or communitization agreement which affects Federal or Indian interests, notwithstanding any provision of a unit or communitization agreement to the contrary."
(52 FR 5391, Feb. 20, 1987 (emphasis supplied)).

5/ The language of Section 12 of the unit agreement cited by Norfolk in support of its argument is that quoted above in footnote 1.

> such Tract shall have allocated to it that percentage of said production equal to its Tract Participation * * *.
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> * * * * * * *
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> * * * all gas and associated liquid hydrocarbons that are produced and sold from the Unit Area * * * shall be considered to be Unitized Substances * * *.

Norfolk asserts that farm farm tap gas is not "sold," but is provided free to certain royalty owners and is, therefore, not a unitized substance subject to royalty calculations. In support of this argument, it directs the Board's attention to two other unit agreements employed in the formation of units shortly after the Bullhook Unit for lands just south of that unit. Those units, it claims, are definitely Federal units and the agreements each contain a Section 12 relating to allocation of production. Norfolk asserts that neither of those agreements define unitized substances, but each indicates in Section 12 that royalty will be paid on free gas. 6/ Norfolk's point is that although such language could easily have been included in the Bullhook Unit Agreement, it was not and the conclusion must be that lack of such language means that free gas was to be royalty free.

BLM disagrees, responding that unless the unit agreement clearly and specifically provides for royalty free gas, farm tap gas is subject to royalty under controlling regulations.

[2] Section 17 of the unit agreement requires the operator to measure "all gas withdrawals." In this respect, the unit agreement is consistent with 43 CFR 3162.7-3, requiring the measurement of all gas production, not just gas which is sold. The portions of the unit agreement relied on by Norfolk do not accord it the right to dispense with measurement of farm tap gas nor waive the royalty obligation for such gas in the face of regulations to the contrary. Such gas is subject to royalty under 30 CFR 202.102 (1987), absent a clear expression to the contrary. 7/ The fact

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6/ The language of those agreements, quoted on page 6 of the SOR, is:

"For the purposes of this paragraph any gas which is used by royalty owner for structures on the land covered by such owner's oil and gas lease, will be a portion of the working interest owner's share of the gas that has been allocated under the terms of this Unit Agreement to such working inter-est owners."

7/ The language of the 1987 regulation is the basis for collection of royalty in this case, since that language provided that gas of all kinds is subject to royalty with only two exceptions: gas used for purposes of production on the leasehold and gas unavoidably lost. Following issuance of the Area Manager's decision, the regulations relating to gas valuation were revised, effective Mar. 1, 1988 (53 FR 1271 (Jan. 15, 1988)), 3 days prior to the State Director's decision. The language of 30 CFR 202.102 was deleted and in its place at 30 CFR 202.150(b)(1) the Department provided:

"All gas (except gas unavoidably lost or used on, or for the benefit of, the lease, including that gas used off-lease for the benefit of the lease when such off-lease use is permitted by MMS or BLM, as appropriate)

that the Bull Hook Unit Agreement lacks the language of the other two agreements cited by Norfolk is not a clear expression to the contrary.

[3] Finally, Norfolk asserts that it had resolved the issue concern-ing farm tap gas with BLM's Lewistown Assistant District Manager, F. Owen Billingsley. Norfolk contends that "this concurrence * * * is significant and should be considered in reviewing the State Director's decision" (SOR at 8). According to the affidavit of Norfolk's vice president of operations, James T. Walters, dated June 13, 1988, provided by Norfolk with its SOR, Billingsley "agreed" in telephone discussions that such gas was not a unitized substance and not subject to royalty and that he was prepared to issue a statement to that effect.

With its answer, BLM submitted an August 24, 1988, affidavit from Billingsley acknowledging telephone conversations with representatives of Norfolk. The affidavit states in part as follows:

> The purpose of these conversations, and the others listed above, was to discuss questions I had about the royalty status of farm tap gas in the Bullhook Unit. My reading of the Unit Agreement had raised some doubts in my mind about whether Federal royalty was due, and I told Mr. Walters, et al., that I felt my decision, when issued, would be that royalties were not due and that gas measurement would therefore not be required. I clearly stated that my opinion was tentative, and that I would obtain advice from the State Office and Field Solicitor's Office before issu-ing a written decision. * * * My superior formally requested an opinion from the Field Solicitor on March 16, 1987 dealing with this question.

Insofar as Norfolk is suggesting that BLM should be estopped to deny the status of farm tap gas as royalty free, Norfolk's argument must fail. Application of the doctrine of equitable estoppel requires a demonstration of affirmative misrepresentation or affirmative concealment of a material fact by the Government. United States v. Ruby, 588 F.2d 697, 703-04 (9th Cir. 1978); First American Title Insurance Co. v. BLM, 110 IBLA 25, 34 (1989). There was no misrepresentation or concealment of a material fact, nor is there any evidence of detrimental reliance upon BLM's conduct by Norfolk. The representation of the personal opinion of a BLM employee, with the caveat that further advice would be sought from superiors and

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fn. 7 (continued)
produced from a Federal or Indian lease to which this subpart applies is subject to royalty."

The new regulatory language expanded the exceptions. Under that language, gas is not subject to royalty where: (1) it is unavoidably lost; (2) it is used on-lease; (3) it is used for the benefit of the lease on the lease; and (4) it is used off-lease, with the approval of MMS or BLM, for the benefit of the lease. The effect of this regulatory change should be addressed by BLM if it seeks to collect royalty for farm tap gas from the Bullhook Unit after Feb. 29, 1988.

from counsel can hardly serve as the basis for a claim of estoppel. Moreover, even assuming Norfolk did receive incorrect information from a BLM employee, it is well settled that reliance upon erroneous or incomplete information furnished by a BLM employee cannot prevail over contrary regulatory requirements. Stephen G. Moore, 111 IBLA 326 (1989); 43 CFR 1810.3(c).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

I concur:

John H. Kelly
Administrative Judge